



Committee on Professional Ethics

Opinion #521 - 4/29/80 (12-80)

Topic: Wills; contact with executor, beneficiaries

Digest: Lawyer may contact executor and/or beneficiaries to advise them that he holds will of deceased client

Code: EC 2-3;
DR 2-103(A)

QUESTION

May a lawyer contact the designated executor and/or beneficiaries under a will of a deceased client to advise them that he holds the original thereof?

OPINION

In N.Y. State 481 (1978), this Committee recognized that the draftsman of a will is uniquely situated to secure additional employment for himself by influencing the client to name him as executor. The present inquiry raises a similar concern: a lawyer who retains possession of an original will may also have, or be perceived to have, a unique opportunity for the solicitation of additional business.

Our Code of Professional Responsibility states that "a lawyer should not contact a non-client, directly or indirectly, for the purpose of being retained to represent him for compensation," (EC 2-3) nor should a lawyer recommend himself "to a non-lawyer who has not sought his advice regarding employment of a lawyer." DR 2-103(A). Thus, it would clearly be a violation of the Code for a lawyer to contact the executor or beneficiaries under a will to recommend himself to probate the will or in any way represent the estate. Cf., N.Y. Judiciary Law §479.

The situation is different, however, where a client has requested his lawyer to retain the original will for safe-keeping, and the lawyer later learns of the client's death. In that case, it would appear that the lawyer has an ethical obligation to carry out his client's wishes, and quite possibly a legal obligation (See, e.g., Scholen v. Guaranty Trust Co., 288

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N.Y. 249, 43 N.E. 2d [1942]; N.Y. Penal Law §190.30; N.Y. SCPA §1401) to notify the executor or the beneficiaries under the will or any other person who may propound the will (see, N.Y. SCPA §1402) that the lawyer has it in his possession. Cf., N.Y. State 188 (proper for lawyer who has drawn will to notify client that old will should be reviewed).

The issue, then, is how best for the lawyer to disclose the fact that he is holding an original will and also refrain from solicitation or the appearance of solicitation.

It is clear that the lawyer may file the decedent's will in Surrogate's Court pursuant to N.Y. SCPA §2508 and thereby avoid any question of improper solicitation. However, by filing the will in court, the lawyer may cause unnecessary delay in the probate of the will and inconvenience to the executor. For this reason, we do not believe that the only option open to a lawyer who is holding a deceased client's will should be to file the will in court.

A far more sensible approach would be for the lawyer to notify the executor or beneficiaries, or any other person who may propound the will, that he has a will of the decedent. The lawyer should make no suggestion that he be retained by the executor and, if asked, should make it clear that the executor is entirely free to retain counsel of his choice. While not essential to a finding of ethical propriety, to avoid any misunderstanding of the lawyer's purpose or methods, prudence would indicate that such notification be in writing.

For the reasons stated, and subject to the conditions set forth, the question posed is answered in the affirmative.
